(7)

Supreme Court, U.S.
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No. 89-189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SAMUEL A. LEWIS,
Director, Arizona Department of Corrections, and
DONALD WAWRZASZEK,
Superintendent, Arizona State Prison,
Petitioners,

v.

JIMMIE WAYNE JEFFERS,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

APPENDIX TO RESPONDENTS BRIEF

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APPENDIX A

Arizona Revised Statutes

§ 13-703. Sentence of death or life imprisonment without possibility of release until the defendant has served a prescribed period of time; aggravating and mitigating circumstances

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the state department of corrections for life, without possibility of release on any basis until the completion of the service of twenty-five calendar years if the victim was fifteen or more years of age and thirty-five years if the victim was under fifteen years of age, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge in the event of the death, resignation, incapacity or disqualification of the judge who presided at the trial or before whom the guilty plea was entered, shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsections F and G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the

court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsection F of this section is

on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis until the defendant has served twenty-five calendar years if the victim was fifteen or more years of age or thirty-five calendar years if the victim was under fifteen years of age, the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United

States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

8. The defendant has been convicted of one or more other homicides, as defined in § 13-1101, which were committed during the commission of the offense.

9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties

and the defendant knew, or should have known, that the victim was a peace officer.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

APPENDIX B

Arizona Trial and Supreme Court Treatment of the (F)(6) Aggravating Circumstance, 1974-1989

The following abbreviations and notations are used in the tables that follow:

(F)(6):	A finding by a court of one or more of the components of the aggravating circumstance in Ariz. Rev. Stat. § 13-703(F)(6), which provides that "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner."
HCD:	A finding by a court pursuant to Ariz. Rev. Stat. § 13-703 that a particular first degree murder was "especially heinous, cruel or depraved" or "especially heinous, cruel, and depraved."
H/D:	A finding by a court pursuant to Ariz. Rev. Stat. § 13-703 that a particular first degree murder was "heinous," "depraved," "heinous or depraved," or "heinous and depraved."
C:	A finding by a court pursuant to Ariz. Rev. Stat. § 13-703 that a particular first degree murder was "cruel."

Az. S. Ct. and Ct.:	**The Arizona Supreme Court.**
*	**Prisoners currently on death row in Arizona, including those whose sentences have been reversed in orders not yet final.**
+	**Facts drawn from decision in codefendant's case that are incorporated by reference in indicated decision.**

Appendix B consists of a comprehensive table (Table B-1) on pages B-3 to B-16, and three summary tables (Tables B-2, B-3 and B-4). Note that the order of the summary tables is reversed:

Table B-2 ..... page B-19
Table B-3 ..... page B-18
Table B-4 ..... page B-17

TABLE B-1: SUMMARY OF ARIZONA TRIAL AND SUPREME COURT TREATMENT OF THE (F)(6) AGGRAVATING CIRCUMSTANCE, 1974-1989
(pages B-3 to B-16)

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
Watson, 559 P.2d 121 (1976)													
Lee, 559 P.2d 657 (1976)													
*Richmond, 560 P.2d 41 (1976)	X	X			X	X	X			X			
*Blazak, 560 P.2d 54 (1977)	X	X			X	X	X						
Jordan, 561 P.2d 1224 (1976)													
Knapp, 562 P.2d 704 (1977)	X	X			X	X	X			X	X		
Holsinger, 563 P.2d 888 (1977)													

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Ceja, 565 P.2d 1274 (1977)	X	X			X	X	X			X	X		
Doss, 568 P.2d 1054 (1977)													
*Bishop, 576 P.2d 122 (1978)	X	X			X	X	X						
*Arnett, 579 P.2d 542 (1978)													
Evans, 584 P.2d 1149 (1978)													
Watson, 586 P.2d 1253 (1978)	X	X			X					X	X		
Brookover, 601 P.2d 1322 (1979)	X	X			X					X	X		

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	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
Lujan, 604 P.2d 629 (1979)	X	X			X					X	X		
*Arnett, 608 P.2d 778 (1980)													
*Mata, 609 P.2d 48 (1980)	X	X			X	X	X						
Madsen, 609 P.2d 1046 (1980)	X			X	X					X	X		
Steelman, 612 P.2d 475 (1980)	X	X			X	X	X			X	X		
*Ceja, 612 P.2d 491 (1980)	X	X			X	X			X	X	X		
Jordan, 614 P.2d 825 (1980)	X	X			X	X	X						

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Clark, 616 P.2d 888 (1980)	X	X			X	X			X	X			
*Bishop, 622 P.2d 478 (1980)	X	X			X	X			X				
*Greenawalt, 624 P.2d 828 (1981)	X	X											
Watson, 628 P.2d 943 (1981)													
*Vickers, 633 P.2d 315 (1981)	X	X			X	X	X			X	X		
*R.W. Tison, 633 P.2d 335 (1981)	X	X			X	X	X			X			
*R.C. Tison, 633 P.2d 355 (1981)	X			X	X	X			X				

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
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	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
Britson, 636 P.2d 628 (1981)													
*J. Smith, 638 P.2d 696 (1981)	X	X			X	X	X						
*Ortiz, 639 P.2d 1020 (1981)	X	X			X	X			X	X	X		
*Blazak, 643 P.2d 694 (1982)	X	X			X						X		
Valencia, 645 P.2d 239 (1982)													
*Poland & Poland, 645 P.2d 784 (1982)	X	X			X					X			
*Woratzeck, 657 P.2d 865 (1983)	X	X			X	X			X	X	X		

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
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	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
Rumsey, 665 P.2d 48 (1983)													
McDaniel, 665 P.2d 70 (1983)	X	X			X	X	X					X	
*Adamson, 665 P.2d 972 (1983)	X	X			X	X	X				X		
*R.L. Smith, 665 P.2d 995 (1983)													
*Richmond, 666 P.2d 57 (1983)	X	X			X					X	X	X	
*Harding, 670 P.2d 383 (1983)	X	X			X	X			X		X	X	
*Lambright, 673 P.2d 1 (1983)	X	X			X	X	X					X	Manner of disposal of body.

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	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*R.D. Smith, 673 P.2d 17 (1983)	X	X			X	X		X					
*Summerlin, 675 P.2d 686 (1983)	X	X			X	X	X					X	Sexual assault contemporaneous with killing.
*McCall, 677 P.2d 920 (1983)	X	X			X	X	X			X		X	(1) Killing committed to "send message to others" in defendant's business; (2) "vile state of mind at the time of the murder."
*Libberton, 685 P.2d 1284 (1984)	X	X			X	X	X						
*James, 685 P.2d 1293 (1984)	X	X			X	X	X			X		X	No compassion or remorse.
*Fisher, 686 P.2d 750 (1984)	X			X	X	X			X				Victim displayed "generosity and concern" to defendant prior to killing.
*Chaney, 686 P.2d 1265 (1984)	X	X			X	X	X						"[C]omplete disregard for the victim's life."

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	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Harding, 687 P.2d 1247 (1984)	X	X			X	X	X						
*R.L. Smith, 687 P.2d 1265 (1984)	X			X	X							X	(1) "[C]old-blooded" murder; (2) "complete lack of understanding of the value of human life."
*Villafuerte, 690 P.2d 42 (1984)	X	X			X	X			X			X	(1) "[P]erverse" method of killing; (2) killing to facilitate escape; (3) defendant did not tell police of bound victim's condition for 48 hours.
*Clabourne, 690 P.2d 54 (1984)	X	X			X	X	X					X	Sexual assault contemporaneous with killing.
*Gillies, 691 P.2d 655 (1984)	X	X			X	X	X						"[S]avage manner of death."
Hensley, 691 P.2d 689 (1984)													
*McMurtrey, 691 P.2d 1099 (1984)													

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
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	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Carriger, 692 P.2d 991 (1984)	X	X			X	X	X			X		X	Victim uncertain as to ultimate fate prior to death.
*Nash, 694 P.2d 222 (1985)													
*P. Poland, 698 P.2d 183 (1985)	X	X			X					X	X		
*M. Poland, 698 P.2d 207 (1985)	X	X			X					X	X		
*Roscoe, 700 P.2d 1312 (1984)	X	X			X	X	X			X			(1) Young victim; (2) killing "repugnant civilized society."
*Martinez-Villareal, 702 P.2d 670 (1985)	X			X	X	X			X	X		X	"[M]anifest disregard for the fundamental principles upon which our society is based."

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
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	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Bracy, 703 P.2d 464 (1985)	X	X			X	X	X			X		X	(1) Victims uncertain as to ultimate fate prior to death; (2) elderly victim.
*Hooper, 703 P.2d 482 (1985)	X	X			X	X	X			X			+Same.
*Rossi, 706 P.2d 371 (1985)	X	X			X	X	X					X	(1) Witness elimination; (2) crime committed "totally without regard for human life;" (3) use of special bullets.
*B. Smith, 707 P.2d 289 (1985)	X	X			X					X	X	X	-
Tittle, 710 P.2d 449 (1985)													
Johnson, 710 P.2d 1050 (1985)	X			X	X						X		
*Correll, 715 P.2d 721 (1986)	X	X			X	X	X				X	X	(1) Witness elimination; (2) crime committed with "total disregard for human life."

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
Castaneda, 724 P.2d 1 (1986)	X	X			X	X	X				X	X	Victim uncertain as to ultimate fate prior to death.
*McMurtrey, 726 P.2d 202 (1986)													
*Wallace, 728 P.2d 232 (1986)	X	X			X	X			X	X		X	(1) Lying in wait; (2) "disregard for human life;" (3) young victims; (4) defendant eschewed "less violent alternatives [that] were readily available."
*K. LaGrand, 733 P.2d 1066 (1987)	X	X			X	X	X					X	"[C]allous disregard for human worth."
*W. LaGrand, 734 P.2d 563 (1987)	X	X			X	X	X					X	+Same.
*Williams, 1987 Westlaw 878													
*Moorman, 744 P.2d 679 (1987)	X	X			X	X	X				X		"[M]atricide."

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Beaty, 762 P.2d 519 (1988)	X	X			X	X	X			X	X		(1) Manner of disposal of body; (2) young victim; (3) killing "repugnant to a civilized society."
Mauro, 766 P.2d 59 (1988)	X	X											
*Vickers, 768 P.2d 1177 (1989)	X	X			X	X	X				X	X	
*Walton, 769 P.2d 1017 (1989)	X	X			X	X	X			X		X	
*McCall, 770 P.2d 1165 (1989)	X	X			X	X	X						
Prince, 772 P.2d 1121 (1989)													

(1)	(2)				(3)	(4)				(5)	(6)	(7)	(8)
Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance				Az. S. Ct. Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D	Arizona Supreme Court Relied on Non-Gretzler Factors in Reviewing H/D in Cases Decided After State v. Gretzler, 659 P.2d 1 (1983)
	(F)(6):	HCD	C only	H/D		(F)(6):	HCD	C only	H/D				
*Wallace, 773 P.2d 983 (1989)	X			X	X	X			X		X	X	(1) "[T]otal disregard for human life;" (2) young victims.
Rockwell, 775 P.2d 1069 (1989)													
*Fulminante, 778 P.2d 602 (1988)	X	X			X	X	X			X	X		Defendant "violated the special parental relationship."
*Bishop, 1989 Westlaw 73451	X	X											
Marlow, 1989 Westlaw 135110	X			X	X	X			X				Witness elimination.
Total Cases (94 Cases Charted)	72	63	0	9	69	56	40	1	15	33	31	24	28

TABLE B-4: SUMMARY OF ARIZONA SUPREME COURT'S POST-GRETZLER TREATMENT OF (F)(6) CIRCUMSTANCE (Summarizing Columns (7) and (8) of Table B-1)

	Arizona Supreme Court After Gretzler Reviewed (F)(6) Finding	Az. S. Ct. After Gretzler Cited Gretzler in Reviewing H/D	Az. S. Ct. After Gretzler Relied on Non-Gretzler Factors in Reviewing H/D
All Reviewed Cases	45	24	28
Percent** of All Reviewed Cases	100%	53%	62%
All Reviewed Cases of Prisoners on Death Row	40	22	26
Percent of All Reviewed Cases of Prisoners on Death Row	100%	55%	65%

**All percentage figures rounded to nearest whole number.

TABLE B-3: SUMMARY OF ARIZONA SUPREME COURT TREATMENT OF (F)(6) AGGRAVATING CIRCUMSTANCE
(Summarizing Columns (3)-(7) of Table B-1)

	Arizona Supreme Court Reviewed (F)(6) Finding	After Reviewing (F)(6) Aggravating Circumstance, Arizona Supreme Court Let Stand:				Az. S. Ct. Cited Dictionary Definitions of H/D	Az. S. Ct. Cited "Above Norm" or Analogous Language	Az. S. Ct. Cited Gretzler in Reviewing H/D
		(F)(6):	HCD	C only	H/D			
All Reviewed Cases	69	56	40	1	15	33	31	24
Percent** of All Reviewed Cases	100%	81%	58%	1%	22%	48%	45%	35%
All Reviewed Cases of Prisoners Currently on Death Row	57	50	35	1	14	26	23	22
Percent of All Reviewed Cases of Prisoners Currently on Death Row	100%	88%	61%	2%	25%	46%	40%	39%

**All percentage figures rounded to nearest whole number.

TABLE B-2: SUMMARY OF ARIZONA TRIAL COURT TREATMENT OF (F)(6) AGGRAVATING CIRCUMSTANCE (Summarizing Columns (1), (2) of Table B-1)

	Cases in which the Trial Court Imposed a Death Sentence that the Arizona Supreme Court Reviewed and in which the Supreme Court Noted the Aggravating Circumstance(s) Found by Trial Court, 1974-1989	Trial Court Found (F)(6) Aggravating Circumstance			
		(F)(6):	HCD	C only	H/D
All Charted Cases	94	72	63	0	9
Percent** of All Charted Cases	100%	77%	67%	0%	10%
All Charted Cases of Prisoners Currently on Death Row	67	59	53	0	6
Percent of All Charted Cases of Prisoners Currently on Death Row	100%	88%	79%	0%	9%

**All percentage figures rounded to nearest whole number.